IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5781

FRANK L. RAKAS and LONNIE L. KING,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, affirming petitioners' convictions, is reported at 46 Ill. App. 3d 569, 4 Ill. Dec. 877, 360 N.E. 2d 1252 (3d Dist. 1977). A copy of this opinion, as well as copies of the unreported order of the Appellate Court denying petitioners' Petition for Rehearing, and the unreported order of the Supreme Court of Illinois, denying petitioners' Petition for Leave to Appeal have been previously submitted to this Court as appendices to the Petition for Writ of Certiorari and, therefore, are not contained in this Brief in Opposition. (Petition for Writ of Certiorari, Appendices A, B and C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondents do not believe that the petitioners have shown any reason for this Court to exercise its sound judicial discretion to grant their Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

Whether a passenger in an automobile owned and operated by a third party has standing to object to a search and seizure directed against the third party.

STATEMENT OF THE CASE

The petitioners, Frank L. Rakas and Lonnie L. King, were indicted by a Kankakee County, Illinois, Grand Jury on three counts of Armed Robbery (R.C. 4-5) and were found guilty, following a jury trial, of all three charges. (R. 343).[1] The incident giving rise to the multi-count indictment was an evening armed robbery of a Robert Hall clothing store located on Illinois Route 50 in Bourbannais, Illinois.

The general descriptions given at trial by the witnesses (and in particular, witness Billy Woods), while possibly capable of fitting the physical description of many men, also fit the petitioners' physical characteristics. Both robbers were male Caucasians as are the petitioners. One robber was approximately 6'1" and weighed between 185 and 195 pounds, while the other robber was approximately 5'11" and weighed between 175 and 185 pounds. (R. 165). Petitioner Rakas is 6'2" and weighs 200 pounds, while Petitioner King is 6' and weighs 165 pounds. (R.C. 22-23). According to witness Woods, the eyebrows of the taller robber were light brown or dark blond. (R. 166). Petitioner Rakas' hair color is blond. (R.C. 23). Woods stated that one robber had a "southern accent." (R. 169). Petitioner King was born and raised in Griffin, Georgia. (R. C. 22; Pre-Sentence Investigation Report at 2). Finally, Woods estimated the robbers' ages to be between twenty-eight (28)

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1. References are made to the Record on Appeal in the following manner:

"R.C." refers to the common law record (*i.e.* pleadings, motions, etc.);

"R." refers to the verbatim transcripts.

and thirty-three (33). (R. 181). Petitioner Rakas was 27 years, 11 months, at the time of the offense, while Petitioner King was 30 years old. (R.C. 22-23).

Moreover, witness Woods positively identified the 30-30 lever action, sawed-off rifle, which was recovered in the car in which the petitioners were riding, as being the same 30-30 level action, sawed-off rifle used in the armed robbery. (R. 168). Woods was familiar with that type of rifle since his father owned a 30-30 lever action rifle. (R. 167). Furthermore, he indicated that the unusual characteristics of the rifle in question made it quite identifiable. (R. 168-169).

The rifle, along with other items of evidence (ammunition, currency,[2] clothing, and "any other thing obtained by unlawful search"[3]), was included in a pre-trial defense Motion to Suppress. (R.C. 50). At the hearing on this Motion, the defense offered the testimony of the petitioners and one Donald Sollers, a Manteno, Illinois policeman.

The petitioners testified that, at 9:45 p.m. on February 4, 1975, they were riding along Illinois Route 50 in a 1970 purple Plymouth Roadrunner owned by one Janette Clontz,

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2. At trial, the store manager related that $162.00 was stolen from the cash register during the armed robbery. (R. 141). He stated that there were over 50 one-dollar bills, a few tens, a lot of fives and no twenties in the register at that time. (R. 141). Officer Deschand testified that the petitioners and their two female companions had the following money on their persons when booked: Rakas: 21 one-dollar bills; King: 18 five-dollar bills, 1 ten and 2 ones; Clontz: 18 one-dollar bills; and Jackson: 17 one-dollar bills [an overall total of 58 ones, 18 fives and 1 ten equaling $158. (R. 237).] (Since the petitioners stopped at a bar before being arrested, the total of $158 was quite reasonable.)

3. A walkie-talkie and a C.B. radio, both of which operated on the same frequency, were also discovered under the car's dash board (People's Exhibits 13 and 14). (R. 224-226).

who was driving. (R. 104, 107, 111-112). King was in the right front seat, and Rakas was in the rear driver's-side seat with another woman, Mary Ann Jackson. (R. 104, 109).[4] As they were proceeding from the R & W Lounge in Manteno, Illinois, a number of police cars pulled them over, ordered all of the occupants out of the car at gun point, and searched both their persons and inside the vehicle. (R. 105-106, 110). No permission for the search was given to, or requested by, the police. (R. 106, 111). Police officers removed a box of shells (People's Exhibit 2) from the car's glove box and the sawed-off rifle (People's Exhibit 1) from underneath the right front seat. (R. 107).

Officer Sollers testified that at about 8:45 p.m., while he was patrolling 4½ miles north of the Robert Hall store, he received a radio report of an armed robbery. He was advised to be on the lookout for two men in a 1970 blue Plymouth Roadrunner (*i.e.* victim Woods' car), bearing a license number beginning with "SA," and having a white racing stripe and a damaged right front. (R. 114, 120, 123). Ten (10) to fifteen (15) minutes after receiving this report, Officer Sollers spotted a purple Roadrunner containing two males and two females. The car bore license number "RT6237," no racing stripe, and no apparent damage; nevertheless, he (Sollers) followed it northbound on Route 50 to the R & W Lounge in Manteno, Illinois. (R. 113-114, 121-122, 124-125).[5] Sollers watched the four people enter the lounge. He then called the sheriff's office for a better description of the robbery suspects. He told the dispatcher

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4. The two women, Clontz and Jackson, were initially accused in connection with the armed robbery, but were subsequently discharged at the preliminary hearing. (R. 97).

5. The car belonging to Billy Woods was subsequently found abandoned on Route 50, about a mile and a half north of the clothing store.

that one of the two men entering the lounge was wearing white shoes, Levi's, and a dark jacket while the other man had on a blue shirt. The dispatcher replied that the man in the blue shirt matched the description of one of the robbers.[6] While Sollers then waited for a sheriff's car, the subjects left the lounge after about 40 minutes, and he (Sollers) again followed their car, this time southbound on Route 50 back toward the Robert Hall store. (R. 117, 123). The car was eventually stopped some fifty (50) to one hundred (100) yards north of the store; the occupants removed at gun point, and a search conducted. (R. 117-118, 123). State Trooper Kurtz took shells from the glove box, and Lieutenant Ponton of the Kankakee County Sheriff's Department found the rifle. (R. 118-119). Sollers did not hear anyone ask permission to search the car, and to his knowledge, none of the items seized were visible from outside

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6. This clothing description varied somewhat from the clothing descriptions of the robbers given at trial. However, the absence of an identical clothing match is easily explained. Officer Sollers stated that the interval between the time he first heard the radio dispatch and the time he first saw the petitioners was between ten (10) and fifteen (15) minutes. (R. 192). Allowing five minutes for the time needed to get the dispatch on the air, Sollers first saw the petitioners some fifteen (15) to twenty (20) minutes after the armed robbery took place. When he first observed them, their car was on Route 50 approximately 4 to 4½ miles north of the Robert Hall store. (R. 120, 191-192, 207-208). Route 50 has a maximum speed limit of 55 m.p.h. (R. 123, 196). Thus, the petitioners had at least ten (10) to fifteen (15) minutes to abandon the first getaway car, change clothing and discard their first set of clothes. The fact that the clothing was never found is not implausible given the vast area in which it could have been hidden.

the car. (R. 119). Prior to the stop, the car was being driven slowly [twenty (20) m.p.h. in a fifty-five(55) m.p.h. zone]. (R. 123).

Following this testimony, the State orally moved to dismiss the Motion to Suppress on the ground that the petitioners were without standing to contest the validity of the police search of a car in which they were passengers but did not own. (R. 125). The Court agreed with the State's assertion and denied the Motion to Suppress. (R. 125-126).

This decision was subsequently upheld by the Illinois Appellate Court, Third Judicial District. *People* v. *Rakas and King*, 46 Ill. App. 3d 569, 4 Ill. Dec. 877, 360 N.E. 2d 1252, 1253-1254 (3d Dist. 1977). (Petition for Writ of Certiorari, Appendix A). A Petition for Rehearing was denied on April 13, 1977. (Petition for Writ of Certiorari, Appendix B). The Illinois Supreme Court denied a Petition for Leave to Appeal on September 30, 1977. (Petition for Writ of Certiorari, Appendix C).

REASONS FOR DENYING THE WRIT OF CERTIORARI PREFATORY STATEMENT

At the outset, it should be noted that the petitioners have failed to show the need for this Court, in the exercise of its sound judicial discretion, to grant their Petition. Rule 19(1), *United States Supreme Court Rules,* 28 U.S.C.A. In particular, they have failed to show that the Illinois courts have "decided a federal question of substance not theretofore determined by this court, or [have] decided it in a way probably not in accord with the applicable decisions of this court." Rule 19(1)(a), *United States Supreme Court Rules,* 28 U.S.C.A. Keeping this admonition in mind, let us turn to the merits of the petitioners' arguments.

I.

A PASSENGER IN AN AUTOMOBILE OWNED AND OPERATED BY A THIRD PARTY DOES NOT HAVE STANDING TO OBJECT TO A SEARCH AND SEIZURE DIRECTED AGAINST THE THIRD PARTY.

Petitioners, relying upon the cases of *Jones* v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) and *Brown* v. *United States,* 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973), urge that they had standing to question the validity of a search of an automobile in which they were riding in as passengers. The automobile was owned and operated by a third party.[7]

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7. The ALR annotation for the *Jones* case [78 ALR 2d 233 (1960)] specifically excluded automobiles from the scope of the annotation. 78 ALR 2d at 249, fn. 7.

On the other hand, the State, in the trial and appellate court, relied upon this Court's decision in *Alderman* v. *United States,* 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), wherein it was stated:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing. 89 S. Ct. at 965. *See also Goldstein* v. *United States,* 316 U.S. 114, 62 S. Ct. 1000, 86 L. Ed. 1312 (1942) and *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 419, 9 L. Ed. 2d 441 (1963).

This Court concluded that, as a general rule, "... Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." 89 S. Ct. at 966-967.

Indeed, even *Jones* v. *United States, supra,* states:

> In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.
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> • • •
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> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. 80 S. Ct. at 731.

As noted by petitioner, the question which he raises has provoked decisions opposing, as well as supporting, his position.[8] In Illinois, the Illinois Supreme Court has held that:

> . . . one challenging the legality of a search as a basis for suppressing evidence must allege and establish that he, himself, was the victim of an invasion of privacy and cannot claim prejudice through the use of evidence gathered as a consequence of a search and seizure directed at another. (Citing to *Alderman* v. *United States, supra*) *People* v. *Black,* 52 Ill. 2d 544, 288 N.E. 2d 376, 382 (1972).

Furthermore, in *People* v. *McNeil,* 53 Ill. 2d 187, 290 N.E. 2d 602, 605 (1972), the Illinois Supreme Court stated:

> . . . we adhere to the rule requiring a defendant to establish the manner in which *his* constitutional rights have been violated before permitting him to challenge the validity of a search and seizure. (Emphasis added).

In the instant case, the petitioners neither claimed, nor actually had, a possessory or property interest in the automobile which was searched. Nor did they allege and establish that *they* were the victims of an invasion of privacy.

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8. Petition for Writ of Certiorari at 6, fn. 2 and 3. In addition to the decisions noted in the Petition, the following cases have also considered this issue: *Moss* v. *State,* 344 N.E. 2d 859, 864 (Ind. Ct. App. 1976) and *Kirkland* v. *State,* 232 N.E. 2d 365, 366 (Ind. 1968) [the foregoing opinions appear to reject the analysis contained in *Paxton* v. *State,* 263 N.E. 2d 636, 642 (Ind. 1970) cited in support of petitioner's position in their Petition for Writ of Certiorari at 6, fn. 2] ; *State* v. *McDaris,* 463 S.W. 2d 813, 817-818 (Mo. 1971) ; *Petition of Gallagher,* 150 Mont. 476, 436 P. 2d 530, 533 (1968) ; *State* v. *Torres,* 81 N.M. 521, 469 P. 2d 166, 171-172 (N.M. Ct. App. 1970), *cert. denied,* 81 N.M. 506, 469 P 2d 151 (1970) ; *United States* v. *Humphrey,* 409 F. 2d 1055, 1058 (10th Cir. 1969) ; All of the above cases support the State's position that petitioners did not have standing.

Indeed, the vehicle was being driven by the car's owner, Janette Clontz. As noted by the Appellate Court, the search was directed against Ms. Clontz and not the petitioners. They were not the "victims" of the search. *People* v. *Rakas and King,* 46 Ill. App. 3d 569, 4 Ill. Dec. 877, 360 N.E. 2d 1252, 1254 (3d Dist. 1977). It is therefore submitted that the Illinois courts have not "decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this court." Rule 19(1)(a), *United States Supreme Court Rules,* 28 U.S.C.A.[9]

II.

EVEN IF PETITIONERS DID HAVE STANDING TO OBJECT, THEY FAILED TO MEET THEIR BURDEN OF PROOF AT THE SUPPRESSION HEARING.

Even if the petitioner's Motion to Suppress were considered on its merits, it would still have been denied since the petitioners failed to meet their burden of proof at the suppression hearing. *Ill. Rev. Stat.,* 1975, ch. 38, § 114-12(b).

In Illinois, a defendant is required to make a prima facie case that the police lacked probably cause to stop him and conduct a search. *cf. People* v. *Normant,* 25 Ill. App. 3d 536, 323 N.E. 2d 553, 558 (1st Dist. 1975). In the instant

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9. The search having been "directed at" Ms. Clontz, it becomes unnecessary to discuss petitioners' second reason for granting their Petition for Writ of Certiorari; to wit, the need for the adoption of the "directed at" theory as an independent basis for standing. Petition for Writ of Certiorari at 7-9. In any event, the theory advanced by petitioners has not been adopted by this Court and, in view of the above-stated facts, there is no reason for this Court to use the instant case as the vehicle to promulgate a new independent basis for standing.

case, Officer Sollers testified that he received a radio transmission stating that the Robert Hall Store had been robbed. A description of the two robbers was given to him, which description stated that the robbers both had dark pants and one was wearing a blue shirt and dark jacket. (R. 115).[10] Officer Sollers also received a description of the getaway car (*i.e.* Woods' automobile). He saw a somewhat similar type of car approach him some ten minutes later coming from the direction of the Robert Hall store. (R. 121). He followed this vehicle to the R & W Lounge in Manteno and watched as four people exited the car and entered the lounge. (R. 113, 115). Sollers proceeded to call the Sheriff's office by telephone in order to get a better description of the armed robbers. (R. 115). The Sheriff's dispatcher asked Sollers for his description of the people in the car. (R. 115). Sollers related that one male was wearing white shoes, Levi's and a dark jacket. The other subject had on a blue pullover shirt. (R. 116). The dispatcher told Sollers that the subject wearing the blue shirt matched the description which they had received. (R. 116). Sollers was told to "stay with the car and watch it" until another Sheriff's car could reach the scene. (R. 116).

Apparently before the second car could arrive, the four individuals exited the lounge and re-entered their vehicle. (R. 116). Sollers was advised to continue to follow the vehicle. (R. 117). The vehicle proceeded south on Route 50 at an extremely slow rate of speed (20 m.p.h. in a 55 m.p.h. zone). (R. 123). The suspects' route was taking them back past the scene of the crime, so the police waited until they reached the immediate area; then they blocked the road, stopped the car and conducted the search which led to the seizure of the sawed-off rifle and ammunition. (R. 117-119).

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10. See fn. 6, *supra*

It is clear that the blue shirt of one suspect matched the preliminary description of the robbers which had been given to the police. This match is what prompted the Sheriff's office to have Officer Sollers keep the subjects under surveillance. Moreover, the subjects drove back toward the scene of the crime at an extremely slow rate of speed as if they were quite fearful of being stopped for a traffic offense by the police car which was following them. These two facts were clearly enough to give Sollers and the other officers probable cause to stop and search the vehicle and its occupants. It is therefore respectfully submitted that the defendants failed to prove a prima facie case of lack of probable cause and thus their suppression motion could have been denied on that basis.

Finally, in view of the other evidence which points to the petitioners' guilt (see Statement of the Case, *supra*), it is respectfully submitted that the petitioners' convictions could be upheld even if the evidence which was the subject of the Motion to Suppress had, in fact, been excluded.

CONCLUSION

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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